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Anticorruption agencies: expressive, constructivist and strategic uses

Daniel Smilov

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Abstract This article explores the reasons for the introduction of anticorruption agencies of a specific type in Eastern Europe. It is argued that one of the important functions of these agencies—which are stronger on information gathering, coordination and strategy rather than on investigation of concrete cases—is to give to the government some leverage over the anticorruption discourse. Presenting the anticorruption commissions and agencies as (discourse-controlling) instruments gives an answer to the troubling question why *governing parties* are at all interested in the introduction of such bodies. Apart from instrumentalization in political discourse, anticorruption bodies in Eastern Europe have had other effects as well. As shown in the Baltic case, institutional engineering provides for a brief window of opportunity during which political forces committed to integrity could gain the upper hand. The problem in Eastern Europe, however, is not the lack of such windows of opportunities—it is more the lack of really committed political forces capable of continuous and consistent anticorruption effort.

The problem in abstract terms

Normally the introduction of new institutions should aim to maximize the benefits and minimize the costs of governance for the public. Yet often it is virtually impossible to measure the concrete costs and benefits of institutional performance either because specific institutions cannot be meaningfully discussed in isolation from the rest of the government, or because they deal with complex and multifaceted problems. In such circumstances, new institutions are adopted primarily as an expression of specific societal values and beliefs. Thus, their introduction represents a constructivist leap of faith: policy-makers create them to demonstrate their own endorsement of and commitment to specific values. The hope is that the introduction of a new institution will inspire both citizens and the state officials to observe these values in everyday life.

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The setting up of anticorruption institutions—agencies, commissions, monitoring groups, etc.—is the primary example of the constructivist strategy presented above. This is so due to the following two reasons. First, the value of anticorruption is undisputed. Moreover, the belief that corruption is the main problem of governance—graver than unemployment, poverty and poor public services—has become firmly established over the last 10 years in many countries in the world, and specifically in Eastern and Central Europe.

Secondly, it is virtually impossible to measure concretely the costs and benefits of the introduction of an anticorruption agency. The problem is twofold. At a rather superficial level, there are no universally shared standards and indicators of performance regarding such anticorruption agencies.¹ This problem was well illustrated in the EU accession process in Eastern Europe by the monitoring reports (accession and post-accession) of the European Commission. In this monitoring exercise, standards and criteria were separately negotiated between Brussels and the different governments of the accession countries.² This context-sensitive style made it virtually impossible to pass rigorous *comparative* evaluations (a fact which has hardly deterred anyone in making such evaluative judgements).

At a deeper level, the performance of anticorruption institutions is practically impossible to measure since there is no reliable measurement of corruption—the very phenomenon they aim to reduce.³ In general, the concept of corruption has become an umbrella term: it captures—apart from quid-pro-quo illicit transactions—diverse public frustrations with inefficiencies, substantive injustices, and unfairness of governmental activities. All these problems are usually lumped together as “corruption” problems. In this way, the “corruption discourse” has become one of the primary vehicles of social criticism in contemporary society, which is hardly a surprise in a political context, in which the grand ideologies of the Left and the Right are passé [4].

Thus, the introduction of anticorruption institutions has become an example of constructivist logic in institutional engineering. These institutions are created not because of concrete cost-benefits analyses, but largely because of public pressure on governments keen on demonstrating their personal integrity, and their commitment to anticorruption.

Some East European illustrations

Eastern Europe has proven a particularly useful laboratory for different institutional experiments over the last 20 years. In the anticorruption field the region boasts a wide spectrum of anticorruption bodies. At the ends of this spectrum we find two

¹ Generally, indicators of performance do not travel well across borders: sentences for corruption related crimes, indictments, prosecutorial checks, proceedings against high-standing officials, corruption prevention, policy-input in institutional reforms, civic education, raising public awareness and others have been used as standards for the evaluation of anticorruption efforts without there being any universal template for assessing the relative weight and importance of each of those.

² For the context-dependence of EU conditionality [8]

³ Perception-based indicators suffer from well known weaknesses: they reflect general public dissatisfaction with the government and are strongly affected by recent public scandals. Proxy measures, such as victimology studies, provide narrow and specific angles to the phenomenon of corruption: for instance, they reduce it to the practice of specific forms of bribery in a given society. See [6]

types of rather different institutions. Firstly, there are the Baltic anticorruption agencies (in Lithuania⁴ and Latvia⁵ in particular) which combine prosecutorial, investigative, preventive and educational prerogatives. These agencies resemble very much the Hong Kong and the New South Wales famous anticorruption bodies. The resemblance is both in terms of powers and relative independence from the government. At the other end of the spectrum we find institutions with preventive and coordinative functions, whose prerogatives are limited to the creation of anticorruption strategies and plans, the monitoring of the implementation of these plans, advice to the government, etc. Such bodies became very popular in South East Europe in the period 2000–2004: for instance, in Albania, there was the so-called Anticorruption Monitoring Group, in Macedonia—the State Commission against Corruption; similar commissions were created in Bulgaria, in Bosnia and other countries as well [10]. In between these two extremes there is a variety of institutions which combine in different proportion investigative, preventive, educational and coordinative functions. Countries do experiment with the possible models: for instance, after trying the “preventive and coordinative” model Bulgaria set up in 2008 a special agency with some limited investigative powers to target high level corruption and involvement in organised crime (State Agency for National Security—SANS).

If one ventures generalizations it needs to be said that the Baltic model of independent multi-task agencies is more the exception rather than the rule in the region. Some countries, like Croatia, Romania and Moldova have chosen a hybrid version: they have set up specialised anticorruption law enforcement units, having significant investigative and prosecutorial prerogatives. The most numerous group of countries, however, have opted for something closer to the “preventive and coordinative” model, and here we can put Macedonia, Serbia, Armenia, Slovenia, Bulgaria (until 2008), Hungary and others.

As it was already mentioned, there are no reliable comparative evaluations of the performance of these institutions. A recent paper has argued that “[p]rogress in fighting corruption in Central and Eastern Europe remains scarce, notwithstanding the establishment of a significant number of new institutions devoted to the cause anti-corruption, and the investment of considerable resources and expertise.” After this rather gloomy conclusion the paper continues to argue that “...it appears from the experience so far that independent, multi-task ACAs of the kind established in Latvia and Lithuania have a better chance to represent a solid anchor for meaningful anti-corruption activities and may be better able to withstand the inherent political pressure”. The authors also argue that “...in a situation where a culture of corruption is present in the public sector...a new, independent multi-task agency appears to stand a better chance of having a fresh start” [1].

It is rather premature to grant the “Baltic model” any form of superiority in the fight against corruption, however. For all we know, the Baltic agencies have indeed stood up to senior politicians and in at least one case have helped to oust a government, as with the resignation of Prime Minister Aigars Kalvitis. But in many countries in the region governments, PMs, and ministers have lost their office due to corruption allegations even without the help of anticorruption agencies. To take an

⁴ Lithuanian Special Investigative Service (STT).

⁵ Corruption Prevention and Combating Bureau (KNAB).

example from Bulgaria, in the last two parliamentary elections governmental parties have lost mostly because losing the anticorruption pre-election debate: thus, in 2001 the ex-tsar Simeon's party won a landslide election against the government of Ivan Kostov, perceived as corrupt by the public; in 2005, the tsarist party was itself defeated in elections mostly because of similar corruption allegations. If anti-corruption agencies just help to oust governments faster, is this their real added value? Do they help the democratic process in this way? Do they represent some form of a substitute for the democratic process?

No one has systematically studied the impact of anticorruption bodies on the democratic process in Eastern European countries. In the name of objectivity, the most it can be said is that the introduction of anticorruption bodies has sometimes helped to break up conservative, inefficient and authoritarian structures of the state machinery, and to introduce a greater degree of separation of powers in law enforcement—an area where the communist legacy of hierarchy and centralism is still felt. Thus, in the Bulgarian case, the introduction of SANS in 2008 helped break up the special services of the largely unreformed Ministry of Interior and diminished dramatically the powers of its head by strengthening the powers of the Prime Minister. Yet, this initial positive result was quickly overshadowed by a string of subsequent scandals in which SANS got entangled, including an attempt to use surveillance instruments against a large section of the Bulgarian media. In January 2009, a senior representative of the European Commission summed up the situation in a revealing way: "...the introduction of SANS was a positive step...Now we expect it to start work [3]."

The politics of anticorruption

The fight against political corruption is a matter of politics. Over the last 10 years an impression was created that this fight could somehow be reduced to the adoption of a set of institutional reforms, and the introduction of certain administrative bodies. Not surprisingly no one is today particularly thrilled with the results of this strategy. Governments in Eastern Europe have entered a competition for proving their personal integrity and commitment to anticorruption through institutional reforms. Thus, countries like Bulgaria and Romania have sophisticated institutional integrity systems, including laws on political money, public procurement, anticorruption bodies, etc.⁶ Despite all this, there is a growing sense of frustration both by the citizens of these countries, and their European partners, who have started to demand "concrete results". What are these results supposed to be, however? Isn't this a euphemism for a demand to replace certain representatives of the current political establishment, whom the public suspects of tacit links with corrupt and criminal circles? Ultimately, the constructivist strategy of the elites—proving commitment to integrity through institutional engineering—has failed in a number of countries in the region. The local elites are increasingly seen as hypocritical, confidence in them is very low, and there are waves of populist newcomers vowing to carry out a "new

⁶ For a review of the general sophistication of the anticorruption institutional framework of the Eastern European countries see [2]

revolution”, create a “new republic”, start the transition again, etc. As a result, Eastern Europe has become the stage for the demagoguery of politicians such as the Kaczynski brothers, Fico, Orban, Basescu, Siderov, Borissov and others: all of those instrumentalize the anticorruption discourse mostly in order to gain power [7].

Generally, the traditional liberal democratic political parties in Eastern Europe are in a precarious situation: their resources for political mobilisation are running out. Political actors—be they in government or in the opposition—need to make use of the anticorruption discourse as a means of mobilising electoral support. The problem for governmental parties is that “corruption” is generally an opposition topic. Traditionally governments have been on the receiving end, denying corruption allegations and attempting to dismiss all accusations unless proven in court. However, governments, sticking only to such a narrow and legalistic conception of corruption,—crimes proven in court—could hardly use the corruption discourse for mobilizational purposes. On the contrary, such governments risk to see virtually everybody talking against them—the media, the NGOs, the businesses, eventually the prosecutors and the police, if they enjoy a degree of autonomy. Governments, therefore, need to reexamine their discourse on corruption very carefully, if they do not want to be left in isolation. In order to break up their discourse isolation, however, governments must take at least some of the following steps:

First they must publicly admit and recognize the problem of corruption. In this way they throw a discourse bridge to potential partners in other groups, who are not directly interested in political changes like the opposition, and build partnerships with them around specific anticorruption measures

With regard to civil society, in exchange for the public recognition of corruption, governments could require cooperation with NGOs in a number of spheres, such as measuring corruption, legislative drafting of programmes, action plans, and other normative acts, consultation with experts, etc.

In the case of the media, the situation is more complex. In contrast to NGOs, the media are not that interested in long-term institutional and legislative measures. They frame public discourse mostly through scandal and personalization of politics. Therefore, personnel changes are indispensable in order to bridge the gap between media and governmental discourse on corruption. For this purpose, governments must involve elements of the prosecutors and the police, with the goal of starting investigations of public persons, possibly including members of the governing parties as well (only in exceptional cases, of course). It is important to stress that for the purposes of collaboration with the media, governments need to focus only on the start of investigations, since media interest is highest at this point, and goes down dramatically at the more complex judicial stages, whose intricate procedures are often impenetrable for the public in general

Even the opposition could be co-opted in terms of anticorruption discourse by a skilful government. The key element here is the depoliticization of the issue through the elaboration of a comprehensive anticorruption plan, which requires profound long-term institutional changes in all areas of governance. Ultimately, governing parties will be successful if they obtain the consent of the opposition for these programmes and plans. It is normally not impossible, since these contain predominantly common-sense measures aiming at the general improvement of governance. And they reduce the chance of anti-corruption measures being

selectively applied to leaders of the opposition. In certain cases, members of the opposition could become also members of watchdog bodies, supervising the implementation of legislative and institutional reforms.

Finally, the government must tread very carefully in its anticorruption discourse in relation to the business sector. The best strategy to ensure its support is to lead a policy of downsizing of the state and lowering the taxes. These are the key anticorruption measures which the business community looks for. Normally, a political crisis and instability are not in the interest of the economic players.

Anticorruption bodies instrumentalized by political players: a model

Although governments must admit the existence of corruption (even if not judicially proven), in order to become players in the discourse battles, they have to do this cautiously. It is impossible for key government politicians to speak regularly about widespread corruption, to measure it, and to organise public awareness campaigns, as this will associate the politicians with corruption in the eyes of the public. Therefore, there is a political need for a semi-autonomous, semi-independent public body to take upon itself the anticorruption discourse on behalf of the ruling parties. Based on the previous discussion, one could conclude that it is rational for such a body to have the following structure and powers:

First, its composition should build bridges with civil society and the opposition. Members of civil society could either participate in the nominations of commissioners, or even sit on the commission. At a minimum, most of the meetings of this body should be open to the public and encourage media coverage and participation of NGOs. As to the opposition, a delicate balance should be sought between its participation and its support for long-term programmatic documents in the fight against corruption;

The powers of these bodies need to be concentrated mainly in the area of institutional reform, legislative drafting, and coordination among other government agencies. Investigative powers are not needed, and indeed, they could antagonize important groups as the police and the prosecutors. It could be the case, however, that the commissions are entitled to initiate proceedings, which then are transferred to the prosecutors and the police for continuation.

In relation to the media, the commission should be able to supply them with media-friendly material. The best is the news of started proceedings and possible indictments. In the absence of such data, the second-best option is statistical data on the spread of corruption in society.

Finally, in relation to business, one could expect that the commission remains discrete and appreciative of the two major factors of business support: downsizing of the state and lowering of the taxes.

Applying the model: a brief case study

After presenting the rationale for the introduction of an anticorruption agency by a government interested to use the anticorruption discourse for gaining political

support, we can start explaining some of the peculiarities of the Eastern European experience. Most importantly, it becomes apparent why the “preventive and coordinative” model has proven much more popular than the Baltic multi-task agency model. The answer is that the former fit much better the above-presented rationale: they allow governments to use the mobilizational force of the corruption discourse without great risks of finding themselves at the receiving end of investigations and trials. To illustrate this thesis let us consider a brief case study of the “preventive and coordinative model”.

At least four South East European countries follow closely the rationale discussed in the previous section. These are Bulgaria (especially until 2008), Albania, Macedonia and Bosnia and Herzegovina.⁷ In all of these countries, partly because of domestic political dynamics, partly due to the pressure exercised by donors (like the Council of Europe, EU, and others), a specific model of anticorruption institutional reforms was adopted, which was aptly named by the EBRD “omnibus programmes”: a coordinated assemblage of governmental structures and policies specifically geared towards fighting corruption. The main elements of the omnibus programmes were the following:

- an anti corruption law;
- a national anticorruption strategy or program;
- a ministerial commission, specialised unit or dedicated agency supervising implementation;
- an action plan to implement the program; and
- a monitoring mechanism.

In Albania, by 2004 a Council of Europe’s project was underway, whose main purpose was to strengthen a newly established anticorruption body: the so-called Anticorruption Monitoring Group. In the same period, the Macedonian State Commission against Corruption was set up (also with help of foreign donors). Similar commissions were created in Bulgaria, in Bosnia and other countries as well.

In Albania, the national anticorruption strategy and action plan were the product of 2 years of dialogue between the donor community and the Albanian government, resulting in a strategic document spanning five reform areas: public administration reform, improved legislation, improvement of public finances management, better transparency in business transactions, to public information and civil society participation. The structure or agency overseeing the progress of the strategy included an anticorruption monitoring group (ACMG)—composed of the legal directors of relevant ministries as well as the Minister of State—to monitor the implementation of the plan, give advice and issue recommendations, and suggest improvement and prioritization of the plan. There was also a permanent secretariat to the ACMG.

The Council of Europe’s approach in Albania was entirely focused on the implementation of the action plan. The institutional structures that had been created

⁷ This part of my paper is based on [10]. For a more detailed analysis of the Albanian and Macedonian anticorruption omnibus programmes please refer to *From the Ground Up*.

had no responsibility or powers beyond ensuring the implementation of the plan. More specifically, they lacked powers of investigation, indictment, etc.

In Macedonia, roughly at the same time, a State Commission for the Fight against Corruption in Macedonia was set up with slightly more expanded prerogatives. Apart from the adopting and monitoring of a national program for corruption prevention and repression, it also had the power to summon—in secret if necessary—persons suspected of corruption before the state commission to clarify their position before possibly starting an initiative before the relevant bodies to discharge, replace or criminally prosecute those suspected elected officials or public servants suspected of corruption.

If we adopt the view of the anticorruption commissions as instruments for the governing parties to mobilise support through the corruption discourse, the structure and the powers of these bodies become much more understandable. Their main purpose was to build what could be called “discourse coalitions” with civil society, the media, and other influential actors. From this perspective, the bodies were quite functional:

First, they managed to gain support of umbrella civil society anticorruption organisations, which comprised NGOs from all possible corners of civil society. Thus, the issue of the fight against corruption was practically depoliticised.⁸

The fight against corruption was successfully shifted from the issue of political and personnel changes to institutional and legislative reforms. From a discourse perspective no one could seriously challenge the governments that they were not “taking measures” against corruption, or not “recognizing” the seriousness of the problem. All in all, the governments had become players in the corruption discourse, competing with the opposition and others over anticorruption as a precious resource of political mobilisation.

The South East European commission enjoyed good relations with the media as well. Parts of the activities initiated or sponsored by these bodies and its supportive civil society organizations were actually televised, and were quite popular. Hot line telephone lines were set up, TV shows were raising public awareness, etc. In all of these, paradoxically, the governments were not always at the receiving end of public criticism, but also got an opportunity to publicise its own efforts in the implementation of the action plans, etc

Conclusions

Towards the end of the 1990s Eastern Europe embarked on an institutional experiment involving a considerable leap of faith: the universal implementation of anticorruption institutional reforms. An important part of these was the setting up of new bodies designed to create and carry out anticorruption policies and strategies. As shown, at the start, these bodies were generally not empowered with investigative

⁸ The best example of anticorruption programmes backed by similar umbrella civil society organisations comes from Bulgaria, where, again with the help of USAID, the Coalition 2000 was created. This body spearheaded a number of anticorruption reforms and generally helped successive governments in the creation of their anticorruption strategies. It has to be stressed that it also adopted a non-confrontational stance vis-à-vis governments of the day, and aimed to secure their cooperation

powers but were involved in building partnerships with civil society groups, and prepared comprehensive anti-corruption strategies, action plans, etc (the “preventive and coordinative” model). These commissions were an essential element of a specific approach to the fight against corruption dubbed by the European Bank for Reconstruction and Development (EBRD) “omnibus programmes” [9].

Initially, these bodies had a positive overall effect in raising public awareness concerning the issue of corruption. Gradually, however, publics seemed to grow tired of this type of activity. Probably, there is a point of saturation at which public awareness of the spread of corruption turns into cynicism regarding anticorruption activities as a whole. If this point is reached, which might well be the case in some countries of the region [10], an important unintended consequence appears. This is the falling confidence in the political establishment, the rise of populist leaders and parties, and the growing general discontent with the constitutional order and liberal democracy.⁹

The increasing public and external pressure for more tangible results in the fight against corruption has led to a second phase of the anti-corruption institutional leap of faith in Eastern Europe. The Baltic countries, as well as several states in the South East corner of the region have created specific investigative and prosecutorial agencies to tackle the problem of corruption. Romania has set up a National Anticorruption Directorate, and Bulgaria (rather more cautiously) is following suit with its SANS.

When we compare the anticorruption leap of faith to other similar cases of institutional engineering—for instance, the democratic and the constitutional ones which took place in the beginning of the 1990s—there is one substantial and obvious difference. While in the first two cases Eastern European reformers relied heavily on copying the established democracies of the Western world, in the third case there were very few such authoritative precedents. Exactly because of this conspicuous lack of precedent, rare and rather exceptional institutional solutions, such as the anti-corruption commissions of Hong Kong and New South Wales, gained disproportionate prominence in policy debates and discussions.¹⁰

If Western experience did not offer a model, other justifications and motivations for the anti-corruption institutional leap should be explored. This paper argued that the reason explaining the massive introduction of anticorruption bodies is not a strong belief in their performance, a strong belief in the results they produce. On the contrary, most of the observers are generally unhappy with the results of anticorruption activities in Eastern Europe. Further, the “performance” issue is complicated by the absence of shared standards and indicators: against this background, there is a flourishing market for “quasi-indicators”, “benchmarks”,

⁹ For the recent rise of populist politics in Eastern Europe see the discussion [5].

¹⁰ The author of this article himself has participated in a number of conferences, seminars and workshops at which experts and politicians from throughout Eastern Europe and Central Asia were discussing the experience of the Hong Kong and New South Wales anticorruption commissions. It is also telling that in the most authoritative handbook on corruption of the early 1990s Arnold Heidenheimer, Michael Johnston, and Victor LeVine (eds.), *Political Corruption*, Transaction Publishers (1989) there is only one article on an anticorruption agency, again from an exotic country and hardly an established democracy—Singapore: Jon S. T. Quah, “Singapore’s Experience in Curbing Corruption”, p. 841.

and “best practices”, a typical feature of which is the presentation of local, context-dependent arguments in support of universal conclusions.

Eastern Europeans have been long trained in the Hegelian doctrine of identity of reason and reality, according to which there should be a sound rational justification for everything that is real, anti-corruption institutions included. In this vein, in this paper it was argued that local politicians and policy-makers needed these institutions as tools of leverage over the anticorruption discourse, which has become one of the most important instruments of political mobilisation. Admittedly, it is a complex argument which could hardly be substantiated in a short article.

Presenting the anticorruption commissions and agencies as (discourse-controlling) instruments is not meant to be a conclusive argument against their introduction. There is no doubt that in certain circumstances they could produce positive results, which go beyond discourse *per se*. Looking at them as discourse tools, however, gives an answer to the troubling question why *governing parties* are at all interested in the introduction of such bodies. The answer suggested here is that these bodies help governments use anticorruption discourse in electoral context in their own favour. Anticorruption, which typically is a topic on which the political opposition thrives, becomes useful for the incumbent who could offer strategies and plans, organise public awareness campaigns, establish links with NGOs, and even initiate corruption proceedings against high profile figures. These possibilities level the playing field between government and opposition in electoral contexts.

As said, apart from instrumentalization in political discourse, anticorruption bodies in Eastern Europe have had other effects as well. At best, as shown in the Baltic case, institutional engineering provides for a brief window of opportunity during which political forces really committed to integrity could gain the upper hand. The problem in Eastern Europe, however, is not the lack of such windows of opportunities—it is more the lack of really committed political forces. What we have now in many countries in the region are troubled party systems, disintegrated mainstream political parties, rising populist and opportunist players. What is urgently needed in Eastern Europe is a revival of the representative structures of democracy: the strengthening of responsible parties, public media, pressure groups, trade unions, etc. If this is not the case, public frustration with the political elites will continue to increase, and it will continue to be vented in terms of corruption allegations. I am afraid that no anticorruption agency would be able to tackle these problems meaningfully, and the public will start to see these bodies primarily as expressions of political hypocrisy.

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